**COMMONWEALTH OF MASSACHUSETTS**

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| **DEPARTMENT OF INDUSTRIAL ACCIDENTS** | **BOARD NOS. 008418-76 072313-87 064318-92** |

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| Frank Cordi | Employee |
| American Saw & Manufacturing Company | Employer |
| USF&G | Insurer |
| Aetna Life and Casualty | Insurer |
| Home Insurance | Insurer |

**REVIEWING BOARD DECISION**
(Judges Maze-Rothstein, McCarthy and Wilson)

**APPEARANCES**
John Dumphy, Esq., for the employee at hearing
Charles R. Casartello, Jr., for the employee on appeal
James Tourtelotte, Esq., for U.S.F.& G. at hearing and on appeal
J. Norman O'Connor, Jr., Esq., for Aetna at hearing
Michelle K. Manners, Esq., for Aetna on appeal
Karen Catuogno, Esq., for Home Insurance at hearing

**MAZE-ROTHSTEIN, J.** This successive insurer case is complicated by the employee's work related injuries to numerous body parts and multiple hearing decisions interspersed with a prior reviewing board recommittal. See Cordi v. American Saw & Mfg. Co., 12 Mass. Workers' Comp. Rep. 432 (1998). USF&G, the first insurer in the succession, appeals a decision ordering it to pay the employee three years of weekly § 34 temporary total incapacity benefits following surgery related to the employee's first injury to his wrist. The subject decision also sustained a prior order against the second insurer on the risk, Aetna, to pay § 35 partial incapacity benefits for an earlier period of incapacity resulting from the combined effects of the first injury to the wrist and the second injury to the shoulder.[1] None of the parties appeal from that aspect of the

[1] Curiously, the decision orders USF&G to reimburse Aetna for twenty weeks of § 35 partial incapacity benefits that "may have" been paid during this period. (Dec. 9.)

decision. USF&G maintains that: 1) the employee failed to prove total incapacity during the entire three-year awarded benefits period; 2) regardless of whether he was totally or partially incapacitated, Aetna, the second insurer, remains liable since the second injury, to the shoulder, continued to contribute to the employee's incapacity; and 3) if the employee is partially incapacitated, under § 35D(3), his earning capacity should be determined by a job offer made more than two years before the period of incapacity at issue. The first two issues listed above require recommittal for the following reasons. The last issue lacks merit.

Frank Cordi worked as a welder for American Saw from 1970 until 1992. In 1976, he injured his right wrist while performing his job. USF&G accepted liability for that injury, but the employee was able to continue in his welding position. In 1987, he developed work-related left shoulder tendonitis. Aetna accepted liability for that injury. To accommodate the combined effects of the two work injuries, Mr. Cordi was moved to a series of lighter duty jobs and paid his full wage. The last of these was a sleeving job, which he did until November 1992. At that time, he was told he would be transferred to the lower paying position of mail clerk. Mr. Cordi felt unqualified for and physically unable to perform the job, and objected to the transfer. His employment was terminated on July 14, 1993 because he refused to accept the mail clerk job. (Dec. 3; Cordi, supra at 433.)

The first decision found the employee partially incapacitated due to the combined effects of the wrist and shoulder injuries. The judge found that no event occurred in November 1992, when the employee left work, to place liability on the last insurer, Home Insurance Company, which was then on the risk. Accordingly, he ordered Aetna, on the risk at the time of the final work injury (the shoulder injury) contributing to the employee's incapacity, to pay § 35 benefits from the last day Cordi worked in 1992 and continuing, premised on the mail room clerk job offer found suitable under § 35D(3). Thereby, the employee's earning capacity was to equate with the lower weekly rate for that job. Aetna and the employee appealed to the reviewing board. Cordi, supra at 434-435. (Dec. 2-4.)

After the first decision issued, the employee underwent three surgeries. On December 5, 1995, he had surgery to his right wrist; on June 26, 1996, he underwent ulnar nerve surgery to his right elbow; and in June of 1998, he had surgery to his right wrist and right elbow to remove scarring from the original two surgeries. (Dec. 4.) During the pendency of the reviewing board appeal, the employee filed a claim for further benefits against USF&G, based on the allegation that surgery to his wrist performed on December 5, 1995, caused increased incapacity. (Dec. 2; Employee br. 3-4.) Following a denial at conference, the employee appealed to a hearing de novo, to which Aetna and Home Insurance Company were joined as parties. (Dec. 2.) The § 34 claim was heard on March 27, 1998. On October 2, 1998, subsequent to the § 34 hearing, but prior to the issuance of a decision on that claim, the reviewing board recommitted the first decision for further findings on the suitability of the job offer and on whether the cumulative stresses of the last job in 1992 amounted to an aggravation injury, thus triggering successive insurer rule liability for the last insurer on the risk, Home Insurance. Cordi, supra at 436.

On May 27, 1997, prior to the second hearing, the employee was examined by a § 11A physician.[2] (Dec. 2, 5; Statutory Ex. 1.) The doctor related the 1995 wrist surgery to Mr. Cordi's 1976 work injury, but was unsure whether the 1996 ulnar nerve surgery of the elbow was work related. (Dec. 5.) The § 11A examiner opined that the employee has a permanent partial impairment of his right upper extremity caused by both his work related wrist *and* unrelated elbow problems. (Statutory Ex. 1.)

The judge found the medical issues to be complex and allowed the submission of additional medical evidence on both the wrist and the shoulder injuries. (Dec. 1-2; Tr.

[2] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence [with regard to the medical issues] contained therein," and expressly prohibits the introduction of other medical testimony unless the judge finds that additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. See O'Brien's Case, 424 Mass. 16 (1996); See also Mendez v. Foxboro Co., 9 Mass. Workers' Comp. Rep. 641, 646-648 (1995) (where § 11A(2)'s reference to "testimony" was interpreted as consistent with the requirements of G.L. c. 233, § 79G).

144-147.) Two depositions were taken of the employee's surgeon. (Dec. 1; Dr. Breen Deps. January 6, 1999 and July 9, 1998.) In addition, USF&G submitted the report and deposition testimony of its § 45 examining physician. To address his shoulder condition, the employee submitted the reports of two treating physicians. (See Employee Ex. 6 and 7.) In June of 1998 the employee had surgery to remove heavy scarring from the 1995 and 1996 right wrist and elbow surgeries. By December of 1998, Mr. Cordi was seeing slow but steady improvement in the use and feeling of his right arm and wrist. (Dec. 4.) No doctor related the elbow surgery to the employee's work, but the two doctors did relate the wrist symptoms to it. (Dec. 5.)

The resulting decision, here on appeal, addressed the reviewing board's recommittal of the first decision, and the employee's new claim for § 34 benefits. With respect to the recommitttal, the judge sustained his original decision finding the employee partially incapacitated beginning in November, 1992. He found that there had been no cumulative injury, which would have placed liability on the insurer on the risk when Mr. Cordi left the employer in 1992. In addition, he made further findings in support of his decision that the mail room job was a suitable one under § 35D(3). (Dec. 6-7.)

On the employee's new claim for § 34 benefits beginning on December 5, 1995, following the employee's wrist surgery, the judge found USF&G liable. He first noted that USF&G paid voluntarily from December 5, 1995 through November 11, 1996, based on the employee's December 1995 wrist surgery and his June 26, 1996 ulnar nerve surgery to his elbow. (Dec. 4.) The judge credited the employee's testimony regarding increased wrist pain and lack of use following his 1995 wrist surgery, and found that surgery reasonable and necessary and related to the original wrist injury. However, "based on the medical opinions above," he found the June 1996 ulnar nerve surgery to his elbow to be unrelated to the employee's work. (Dec. 8.) The judge found the 1998 *wrist* surgery reasonable and necessary to restore some use to the hand, but made no finding on the elbow surgery performed at the same time. (Dec. 8.) The judge further found that the employee's left shoulder still ached and limited his range of motion above shoulder level.

He wrote:

> This is about the same as in 1992, although it produces more pain now. In 1996 he began active treatment on his shoulder as well, and has undergone a series of cortisone shots. He underwent an MRI of the shoulder in October of 1997. Mr. Cordi states surgery is now recommended on the shoulder as well, however the only medical regarding the shoulder is an older one of Dr. Goss which states that further diagnostic tests are necessary to determine whether the pain is amenable to surgical repair.

(Dec. 5.)

Addressing the extent of the employee's disability, the judge concluded that, "[a]fter the first surgery to his hand . . . he was totally disabled from work *as a result of his hand injury alone*. The pain continued to where he had additional surgery in June of 1998 to deal with the scar tissue from the first surgery." (Dec. 7.) (Emphasis added.) As regards the mail clerk job, found suitable and available when offered to the employee in 1992, the judge found that, though changes had been made in the job in 1997 which would make it easier to perform than in 1992, it had not been offered to the employee since his wrist surgery. (Dec. 6.) The judge went on to award § 34 benefits from December 5, 1995 until December 5, 1998, finding that Mr. Cordi finally saw some improvement in the use of his hand by the latter date. Since that time coincided with the expiration of § 34 benefits to be paid by USF&G, the judge specifically reserved the employee's right to bring a further claim for incapacity after December 5, 1998, against either Aetna or USF&G. (Dec. 8, 10.) The judge also ordered USF&G to pay for treatment and surgery to the employee's wrist, and Aetna to pay for treatment to his shoulder. (Dec. 9.)

USF&G raises three issues. First, it claims that the employee failed to prove total incapacity during the entire period from December 5, 1995 to December 5, 1998. In support of this argument, it cites the employee's testimony that he continued to perform activities at his wife's laundry business, though at a reduced level, after the 1995 and 1996 surgeries. It also claims that both § 11A examiner, and its examining physician, found Mr. Cordi capable of work activities proving he was not totally medically disabled.

In addition, USF&G maintains that the record medical evidence indicates that a portion of wrist and right arm problems are due to ulnar nerve damage, which the judge found was unrelated to his work injury. It avers that, but for this ulnar nerve damage and restorative surgery in 1998, for which USF&G was not responsible, the employee would not have been totally disabled. (Insurer br., 15.)

We begin by noting that USF&G voluntarily paid § 34 benefits and medical benefits from December 5, 1995 until November 22, 1996. (Dec. 4.) At hearing, the judge specifically asked whether the benefits it paid between late 1995 and November 1996 were in dispute. USF&G's counsel indicated that they were not. (Tr. 24.) However, on appeal it now states that these benefits were paid without prejudice, (Insurer br. 4; see Employee Ex. 2, Insurer's Notification of Payment), and argues that it is not liable for payment during this time. This argument is without merit since USF&G made no such challenge at hearing. Therefore, it may not dispute liability for the period from December 5, 1995 through November 22, 1996 for the first time on appeal. (Dec. 4.) See Wynn & Wynn, P.C., v. Mass. Comm'n Against Discrimination, 431 Mass. 655, 674 (2000)(objections, issues and claims not raised below are waived on appeal regardless of merit).

We next address USF&G's arguments as to its liability for benefits after November 22, 1996. On the issue of whether the employee has met his burden of proving total incapacity from November 22, 1996 to December 5, 1998, the findings are insufficient for us to determine whether the law was correctly applied. See Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). The insurer submits that the employee's total incapacity was at least in part due to his after-occurring, unrelated ulnar nerve problems requiring surgery to his elbow. This argument goes as much to the issue of causal relationship as to extent of incapacity. Where, as here, the employee has a work-related injury (to the wrist) *followed* by a disease or injury unrelated to his employment (the ulnar nerve problem), the judge must "narrowly focus on and determine the extent of physical injury or harm to the body that is causally related solely to the work injury." Patient v. Harrington & Richardson, 9 Mass. Workers' Comp.

Rep. 679, 683 (1995). As the insurer points out, there was testimony by the employee's surgeon that the ulnar nerve (in the elbow) caused both sensory and motor problems in the employee's hand. (Dr. Breen Dep. January 1, 1999, 46-48.) However, despite this testimony, other than finding the ulnar nerve surgery unrelated to the employee's work injury, the judge did not address causation and extent of incapacity absent the after-occurring elbow ulnar condition. Moreover, in finding the employee totally incapacitated due to his hand problems alone, the judge relied on no medical opinion in particular. (See Dec. 7.) Thus, we have no idea how he reached that conclusion. It has long been established that, where the cause of medical disability is beyond the common knowledge and experience of a layperson, proof of causation must be supported by expert medical testimony. Josi's Case, 324 Mass. 415, 417-418 (1949). This is clearly a case where expert testimony is necessary to support a finding on causal relationship. On recommittal, the judge should reassess his finding total incapacity after November 22, 1996, due solely to the wrist injury, specifically addressing and excluding the impact of the unrelated ulnar nerve problem and surgeries (1996 and 1998) on the employee's incapacity, and grounding his conclusions in the medical evidence.

We next address USF&G's argument that the § 11A doctor and its own § 45 physician both offered medical opinions that the employee was capable of activities which would render him not totally incapacitated. The employee correctly responds that, in finding total incapacity, the judge was warranted in crediting his complaints of pain. Anderson v. Anderson Motor Lines, Inc., 4 Mass. Workers' Comp. Rep. 65 (1990). Indeed, findings regarding pain may even permit a finding of total incapacity where the medical testimony is that the employee is partially incapacitated. Id. Tremblay v. Art Cement Products Co., Inc., 13 Mass. Workers' Comp. Rep. 236, 239 (1999). However, in determining extent of incapacity, the considerations must also include vocational factors and medical restrictions. Id. Moreover, a conclusion on incapacity at any point in time ordinarily requires expert medical testimony. Allen v. Luciano Refrigeration, 15 Mass. Workers' Comp. Rep.___ (October 5, 2001); Cipoletta v. Metropolitan Dist. Comm'n, 12 Mass. Workers' Comp. Rep. 206, 208 (1998). Here, though a large number

of medicals were admitted into evidence, the judge made no findings as to what medical opinions he adopted or rejected regarding extent of incapacity. The closest brush with a medical opinion on point was the judge's observation that "According to the doctor,[3] by December of 1998, Mr. Cordi was finally seeing some improvement in the use of his hand . . . ." (Dec. 8.) However, this statement does not address the extent of the employee's incapacity prior to December 1998, or indicate what, if anything, the judge made of the other four doctors' opinions whose reports or depositions were presented on the issue. The judge is free to credit the testimony of one medical expert over another, Wright v. Energy Options, 13 Mass. Workers' Comp. Rep. 263, 266 (1999), but we should be able to tell on what medical evidence, if any, he based his award. Allen, supra. His general finding on extent of incapacity "must emerge clearly from the matrix of his subsidiary findings." Crowell, supra at 4. "Where we cannot discern the reasoning that supports the judge's award of compensation benefits, and where the conclusion reached by the judge on the extent of incapacity does not rationally flow from his subsidiary findings of fact on the lay and medical evidence, we must recommit the case." Cipoletta, supra at 208. On recommittal, therefore, the judge should either adopt or reject the medical opinions of the physicians who presented evidence on extent of incapacity. If he adopts the medical restrictions a physician has placed on the employee, he must factor that opinion into his incapacity analysis. Tremblay, supra at 239.

We also have no idea how the judge viewed the employee's testimony regarding his activities at the laundry owned by his wife, since the judge did not mention it in the decision. Findings of fact in this area would appear to be relevant in determining the employee's earning capacity, if any. See Griffin v. State Lottery Comm'n, 14 Mass. Workers' Comp. Rep. 347, 349 (2000) (findings regarding employee's post-injury work managing daughter's real estate office were relevant to calculating earning capacity). Nor did the judge perform any vocational analysis for the 1995 post-surgery period of

[3] Presumably the judge was referring to the testimony of the employee's surgeon, Dr. Breen, who performed the employee's 1998 surgery.

incapacity. On recommittal, the judge should address the factors of age, education, background, training, work experience, mental ability, and other capabilities, set forth in Scheffler's Case, 419 Mass. 251, 256 (1994).

As to the successive insurer rule, USF&G next argues that, regardless of whether the employee was totally or partially incapacitated, his shoulder injury, which occurred after his wrist injury and for which Aetna was responsible, continued to play a role in his incapacity, and that therefore Aetna was liable for the employee's ongoing incapacity. On the facts of this case, the question of extent of medical disability involves two distinct legal considerations. First, as discussed above, an assessment of extent must be made explicitly excluding the unrelated after-occurring ulnar nerve problem. Second, in order to properly address successive insurer rule concerns, the judge must also make further findings regarding the impact of the second work injury to the employee's shoulder. If that injury contributes "even to the slightest extent," then the successive insurer rule requires that liability for incapacity after November 22, 1996, be placed on Aetna. See Rock's Case, 323 Mass. 428, 429 (1998).

As they stand, the findings on the employee's shoulder injury do not appear to support his conclusion that the employee's wrist injury *alone* caused his total medical disability. The judge found that, "Before the [1995] surgery to his hand, Mr. Cordi was still partially disabled by the combination of his hand and his left shoulder complaints." (Dec. 7.) The judge did not go on to find that the employee's left shoulder complaints subsided after his wrist surgery. Compare Dillon's Case, 335 Mass. 285 (1957) (employee fully recovered from the effects of second injury, and remaining partial incapacity was wholly attributable to the residual effects of the first injury). Rather, he found that there was no medical evidence which persuaded him that the shoulder was any worse than it was in November of 1992. (Dec. 8.) Yet confoundingly, he observed that, "Mr. Cordi's left shoulder . . . still ached, and he has problems raising his left arm above shoulder level. This is about the same as in 1992, *although it produces more pain now*." (Dec. 5, emphasis added.) These findings seem to indicate that the shoulder injury

continued to contribute to the employee's incapacity.[4] On recommittal, the judge should revisit his conclusion that the wrist injury was the *sole* cause of the employee's incapacity after his elbow surgeries, supporting it with medical evidence, and reconciling it, if possible, with his findings regarding the shoulder injury.

If the judge is unable to adequately support his conclusion that the wrist injury was the sole cause of disability after the 1995 surgery, but instead finds that the shoulder injury contributed to the employee's incapacity, however slightly, then, under the "successive insurer rule," Aetna, the insurer on the risk when the employee injured his shoulder, is liable for the employee's incapacity. The employee's argument that because the wrist injury "swamped" the shoulder injury in severity after the 1995 surgery misconstrues the law in successive insurer cases. See Morin's Case, 321 Mass. 310, 312 (1947) (where the employee sustains two compensable injuries, "the insurer on the risk at the time of the second injury must be held liable to pay compensation for an incapacity following that injury where there is a causal connection between that injury and the incapacity although the earlier injury may have been a contributing cause or even the major contributing cause"). Accord Barrett v. Boston Red Sox, 10 Mass. Workers' Comp. Rep. 112, 115-116 (1990)(where employee returns to pre-second injury baseline in successive insurer case, liability for paying benefits likewise reverts to status that prevailed at that time).

Finally, USF&G argues that the employee's earning capacity should be determined by the amount the employee would have earned in the mail clerk job, which the judge had found suitable when it was offered to the employee in 1992. (See Dec. 2.) It terminated the employee's § 34 benefits on November 22, 1996. (Dec. 4.) It maintains that said termination was based on a determination by the physician who performed the

[4] The insurer points out that there was medical evidence that the shoulder injury continued to contribute to the employee's incapacity as late as 1997. Doctor Titus, who treated the employee for his shoulder, concluded, "This man certainly is disabled for any heavy, repetitive physical labor, in my opinion, due to a *combination* of his bilateral upper extremity involvement." (Employee Ex. 6, Office notes of Dr. Titus dated June 12, 1997, emphasis added.)

employee's 1995 and 1996 surgeries, that the employee was able to perform the mail clerk job duties as of November 14, 1996. (Insurer br. 4-5.) General Laws c. 152, § 35(D), as amended by St. 1991 c. 398, § 66, provides, in pertinent part:

> For the purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:--
>
> . . .
>
> (3) The earnings the employee is capable of earning in a particular suitable job, provided, however, that such job has been made available to the employee and he is capable of performing it.
>
> . . .
>
> (5) Implementation of this section is subject to the procedures contained in section eight. . . .

The relevant part of G.L. c. 152, § 8, as amended by St. 1991 c. 398, §§ 23 to25, provides:

> (2) An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations:
>
> . . .
>
> (d) the insurer has possession of (i) a medical report from the treating physician, or, if an impartial medical examiner has made a report pursuant to section eleven A or subsection (4) of this section, the report of such examiner, and either of such reports indicates that the employee is capable of return to the job held at the time of injury, or other suitable job pursuant to section thirty–five D consistent with the employee's physical and mental condition as reported by said physician and (ii) a written report from the person employing said employee at the time of injury indicating that such a suitable job is open and has been made available, *and remains open to the employee*; . . .

(Emphasis added.) The insurer admits, and the judge found, that it did not offer the mail clerk job to the employee after November of 1992. (Insurer br. 11; Dec. 6.) The insurer was paying § 34 benefits and therefore could terminate or reduce them only in accordance with the provisions of § 8(2)(d). The insurer argues that, had the employee taken the mail clerk job in 1992, it would have remained open for him in 1996. However, § 8(2), requires a written report that the suitable job is open, has been made available, and remains open to the employee at the time of the discontinuance. There was no evidence

of such a report; in fact, the evidence submitted by the employee indicates that the mail clerk job was not open in 1996 or 1997. (Employee Ex. 3.) As the job was not available, we need go no further in our analysis under § 35D.[5] See Siever v. Commonwealth Elec. Co., 13 Mass. Workers' Comp. Rep. 49, 51 (1999)(§ 35D(3) requires a post-injury job to be both suitable and available in order to be used in determining earning capacity). If, on recommittal, the judge finds the employee to be partially incapacitated for any period of time after November 22, 1996, he may not use the mail clerk position offered in 1992 to determine his earning capacity.

We recommit this case for further findings consistent with this decision. In the interest of justice, the judge may take such further evidence as he deems necessary.

So ordered.

Filed: February 5, 2002

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

[5] Specifically, we need not decide the insurer's claim that a job offer, once made and determined suitable, determines an employee's earning capacity "in perpetuity." (See Insurer br. 16.)